



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 5, 1998

Mr. John Riley
Director, Litigation Support Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-0604

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113016.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for the commission's file "on the unauthorized dump site owned by Herman Nethery and located at 500 Deepwood in Dallas, #MSW-455040040." You state that some responsive information will be released to the requestor, but contend that other documents may be withheld from the public pursuant to, among other things, section 552.103 of the Government Code. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1.

You explain that the commission

has separate, ongoing litigation pending against Herman Nethery and Herman Gibbons, relating to the site in question, for criminal violations, and against Nethery alone for civil violations at the site. [The commission] recently received a judgment against Nethery for the civil violations, for which Mr. Nethery has filed or has noticed his intent to file a *pro se* appeal.

Based on the above representation and a review of the documents at issue, we conclude that in this instance you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103. The commission may therefore withhold requested records pursuant to section 552.103,¹ with the following exceptions.

We note that among the documents you seek to withhold is an executed search warrant. It is well established that information specifically made public by law outside the Open Records Act may not be withheld pursuant to any of the act's exceptions to required public disclosure. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Article 18.01(b) of the Code of Criminal Procedure provides:

No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. *The affidavit is public information if executed.* [Emphasis added.]

See also Houston Chronicle Publishing Co. v. Woods, 949 S.W.2d 492 (Tex. App.--Beaumont 1997, orig. proceeding). Because you have submitted to this office for review only a representative sample of the requested records, it is not clear to this office whether the commission actually holds any supporting search warrant affidavits. To the extent that the commission maintains such an affidavit, it must be released to the requestor pursuant to article 18.01(b) of the Code of Criminal Procedure. Similarly, any of the records at issue, such as the search warrant itself, that have been publicly filed with the court in connection with the pending litigation may not be withheld from the public pursuant to section 552.103 or any of the other exceptions you have raised. *Cf. Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (information contained in public court records not protected from public disclosure pursuant to common-law privacy).

¹Because we resolve your request under section 552.103, we need not address the applicability of the other exceptions you raised. In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We further note that our conclusion here is based on the assumption that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.,* through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have had access to any of these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Loretta DeHay". The signature is fluid and cursive, with the first name "Loretta" and last name "DeHay" clearly distinguishable.

Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/RWP/rho

Ref.: ID# 113016

Enclosure: Submitted documents

cc: Ms. Dusty Rhodes
Michael M. Daniel, P.C.
3301 Elm Street
Dallas, Texas 75226
(w/o enclosures)